MAYBAN FINANCE BHD

v.

LIEW EK CHIU & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
STEVE SHIM J
[SUIT NO: KG 72 OF 1993/III]
10 JANUARY 1997

CONTRACT: *Undue influence - Nature and extent of doctrine - Contracts Act 1950, s. 16 - Application in the Malaysian context - Whether bank had notice of undue influence - Whether transaction valid*

The plaintiff claimed against the 2nd defendant pursuant to the memorandum of charge ('MOC') for the difference between the amount owing as at the date of the public auction of the property and the amount actually recovered by the plaintiff from the proceeds of sale from the said auction.

The 2nd defendant raised the defence that her execution of the MOC was procured by undue influence on the part of the plaintiff and her husband, the 1st defendant. The main thrust of the 2nd defendant's case was that: (i) the 1st defendant had exercised domination over her at all material times; and (ii) the plaintiff had constructive, if not actual, notice of the undue influence exercised by the 1st defendant over her.

Held:

[1] It is only in exceptional circumstances that the equitable remedy of setting aside a transaction on the ground of undue influence will be granted by the courts. Even if a bargain appears to be harsh, the courts are not inclined to intervene unless the transaction is to the manifest disadvantage of the person subjected to the dominating influence.

[2] The nature and extent of the doctrine of undue influence has to be examined in the Malaysian context by looking at the actual words in s. 16(1) of the Contracts Act 1950 ('the CA'). It will be wrong and wholly out of place to decide a Malaysian case solely by reference to English or other Commonwealth decisions.

[3] A flexible approach should be adopted in construing the provisions of s. 16 of the CA. This is to be done by interpreting s. 16 in a broad and liberal fashion. The reason for such an approach is because s. 16 is a remedial provision and also because there is an absence of any intention on the part of Parliament to alter the doctrine of undue influence or to deprive it of the flexibility it has acquired through historical development.

[4] Where a transaction is tainted by undue influence, it will be invalid as between the parties thereto and their privies. It will also be invalid as against any other person who seeks to enforce the transaction with knowledge or notice, actual or constructive, that it has been procured by undue influence or any other vitiating element.

[5] The onus of proof when undue influence has been alleged lies on the party alleging the undue influence. There are certain relationships which can give rise to a presumption of undue influence but the relationship of husband and wife is not one of them.

[6] On the evidence adduced, the court found that the execution of the MOC was not obtained or procured by any pressure or undue influence on the part of the 1st defendant as alleged by the 2nd defendant, nor could any actual or constructive notice of such pressure or undue influence, if any, be attached to the plaintiff.

[Judgment entered accordingly.]

Cases referred to:
Bank of Montreal v. Stuart [1911] AC 120 ***(cit)***
Barclays Bank Plc v. O'Brien [1994] 1 AC 180 ***(refd)***
National Westminster Bank v. Morgan [1985] 1 All ER 821 ***(cit)***
Poosathurai v. Kannappa Chettiar & Ors [1920] AIR 65 ***(cit)***
Public Finance Bhd v. Lee Bee Rubber Factory Sdn Bhd & Ors [1994] 2 CLJ 646 ***(cit)***
Saw Gaik Beow v. Cheong Yew Weng & Ors [1989] 3 MLJ 301 ***(refd)***
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors [1997] 2 CLJ 607 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 16(1)

[Editor's note: This judgment was received on 7 October 1997]

For the plaintiff - Libat Langub; M/s Dr Yaacob & Ismail
For the defendants - Marina Foo; M/s Tang & Partners

JUDGMENT

Steve Shim J:

Initially, this action by the plaintiff was directed against all the three defendants. Whilst the 2nd defendant resisted the plaintiff's claim by entering appearance arid filing a defence and counter-claim, the 1st and 3rd defendants did not. In consequence, judgement in default was entered against the 1st and 3rd defendants. The plaintiff's claim against the 2nd defendant is made

pursuant to cl. 7 of the Memorandum of Charge (MOC), allegedly for the difference between the amount owing as at the date of the public auction of the property described as Lot 178, Section 17, Kuching Town Land District and the amount actually recovered by the plaintiff from the proceeds of sale in Originating Summons No. KG. 234 of 1986. The defence of the 2nd defendant is that the execution by her of the said MOC was procured by undue influence on the part of the plaintiff and the 1st defendant. She has also, on the same basis, counter-claimed against the plaintiff.

It seems obvious, in the circumstances, that the main thrust of the 2nd defendant's defence is one of undue influence. Now, the law on undue influence is provided for in s. 16(1) of the Contracts Act 1950 which stipulates as follows:

> A contract is said to be induced by 'undue influence' where relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

With the above statutory definition in mind, Edgar Joseph Jr J (as he then was) in *Saw Gaik Beow v. Cheong Yew Weng & Ors.* [1989] 3 MLJ 301 took the opportunity to discuss briefly the nature of the doctrine of undue influence as perceived by some Indian and English authorities. He cited in particular *Poosathurai v. Kannappa Chettiar & Ors* AIR [1920] PC 65; *National Westminster Bank v. Morgan* [1985] 1 All ER 821; *Bank of Montreal v. Stuart* [1911] AC 120. And he then concluded thus:

> Accordingly, it is, I think, not an unfair summary of the legal position to say that it is only in exceptional circumstances that the equitable remedy of setting aside a transaction on grounds of undue influence will be granted. So, even if a bargain may appear to be harsh, courts are not inclined to intervene unless it can also be demonstrated that the transaction was to the manifest disadvantage of the person subjected to the dominating influence. The foundation of the principle to grant equitable relief of this kind is not inequality of bargaining power but the prevention of victimization by one party of another.

A more in-depth discourse on the doctrine was taken by Gopal Sri Ram JCA in the recent case of *Tengku Abdullah Ibni Sultan Abu Bakar & 8 Ors. v. Mohd. Latiff bin Shah Mohd. & 2 Ors.* [1996] 2 AMR 2633 wherein he adopted the view that the nature and extent of the doctrine had to be examined in the Malaysian context which meant looking at the actual words provided in s. 16(1) of the Contracts Act. He sounded a cautionary note to the courts minded to adopt the approach of some English courts on the subject. After citing the provisions of s. 16 aforesaid, he said thus:

> It has been recognised that the section does not differ from the English law upon the subject of undue influence: See, *Poosathurai v. Kannapa Chettiar* [1919] LR 47/A1. Decisions of English courts are therefore a useful guide to the approach that our courts ought to adopt to the interpretation of s. 16. Much the same may be said of the decisions of the courts of those jurisdictions where the law upon the subject of undue influence is the same as English law.
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> That said, we are of the view that our courts, when faced with a case of undue influence in the sphere of the law of contract, must primarily harken to the words which Parliament has used to introduce the doctrine into our jurisprudence. While we may refer to the decisions of courts of those jurisdictions where the law is akin to our own, we must therefore ultimately have regard to the words of our own statute.
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> In our judgment, it would be quite wrong, and indeed wholly out of place, to decide a Malaysian case **solely** by reference to English or other Commonwealth decisions. Indeed, the more recent decisions of the English courts demonstrate that their concept of the doctrine and the relationships to which it may be extended do not accord to the standards of our society.

The learned judge preferred a more flexible approach in construing the provisions of s. 16. This was what he had to say:

> Undue influence, like all other equitable doctrines, is an extremely flexible concept. Subject to policy considerations, the categories in which it may operate are therefore not closed. For this reason, it is important to apply the doctrine, as housed in s. 16 of the Contracts Act 1950, to varying fact patterns in a flexible manner. This is to be done by interpreting s. 16 in a broad and liberal fashion. Being a remedial provision – in the sense that it is designed to relieve obligations – it should, in our judgment, be given a liberal interpretation. Even in cases, which are not *stricto sensu* contractual in nature, the section may be resorted to by analogy. Another reason for adopting this approach to interpretation lies in the absence of any intention on the part of Parliament to alter the doctrine or to deprive it of the flexibility it has acquired through historical development.

His Lordship then referred to another principle which he regarded as a necessary adjunct to the doctrine, namely, that where a transaction was tainted by undue influence, it was invalid as between the parties thereto and their privies; that it was also invalid as against any other person who sought to enforce the transaction with knowledge or notice, actual or constructive, that it was procured by undue influence or any other vitiating element. In this connection, he approved the following passage of the speech by Lord Browne-Wilkinson in *Barclays Bank Plc v. O'Brien* [1994] 1 AC 180 which reads:

> Up to this point I have been considering the right of a claimant wife to set aside a transaction as against the wrongdoing husband when the transaction has been procured by his undue influence. But in surety cases the decisive question is whether the claimant wife can set aside the transaction, not against the wrongdoing husband, but against the creditor bank. Of course, if the wrongdoing husband is acting as agent for the creditor bank in obtaining the surety from the wife, the creditor will be fixed with the wrongdoing of its own agent and the surety contract can be set aside as against the creditor. Apart from this, if the creditor bank has notice, actual or constructive, of the undue influence exercised by the husband (and consequentially of the wife's equity to set aside the transaction) the creditor will take subject to that equity and the wife can set aside the transaction against the creditor (albeit a purchaser for value) as well as against the husband: see *Bainbrigge v. Browne* [1881] 18 Ch D 188 and *Bank of Credit and Commerce International SA v. Aboody* [1990] 1 QB 923, 973. Similarly, in cases such as the present where the wife has been induced to enter into the transaction by the husband's misrepresentation, her equity to set aside the transaction will be enforceable against the creditor if either the husband was acting as the creditor's agent or the creditor had actual or constructive notice.
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> ... A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside that transaction will be enforceable against third parties (eg. against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity. Although there may be cases where, without artificiality, it can properly be held that the husband was acting as the agent of the creditor in procuring the wife to stand as surety, such cases will be of very rare occurrence. The key to the problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction.
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> The doctrine of notice lies at the heart of equity ... Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand surety.

Before going into the facts of the present case, it is, I think, also significant to deal with the issue as to the onus of proof when undue influence has been alleged. Some guidance can be found in the observation of Edgar Joseph Jr. J in *Saw Gaik Beow, supra,* when he said at p. 308:

> ... quite apart from the question of manifest disadvantage, a party relying on the plea of undue influence would have to show that (a) the other party had the capacity to influence him, (b) the influence was exercised, (c) its exercise was undue and (d) that its exercise brought about the transaction (see *Bank of Credit & Commerce & Anor v. Aboody*).

From the above, it seems clear that the onus of proof generally lies on the party alleging undue influence. There are however certain relationships which can give rise to a presumption of undue influence but the case authorities appear to establish that the relationship of husband and wife is not one of them: see *Public Finance Bhd. v. Lee Bee Rubber Factory Sdn. Bhd. & Ors.* [1994] 1 MLJ 495 on p. 505. That being the position, in the instant case, the 2nd defendant, having alleged undue influence on the part of the plaintiff and the 1st defendant, the onus would be on her to prove it.

In the light of the applicable principles set forth, what then do the facts in this case establish? Here, the main thrust of the 2nd defendant's case, as reflected in her counsel's submission, is two-pronged, namely, (1) that the 1st defendant (her husband) had exercised domination over the 2nd defendant at all material times and (2) that the plaintiff had constructive, if not actual, notice of the undue influence exercised by the 1st defendant on the 2nd defendant.

As regards (1) which I may describe as the first line of defence, the 2nd defendant has testified at length the constant physical and verbal abuses inflicted on her by her husband the 1st defendant during their marriage; that she had endured all this in apparent submissiveness and stoic silence for some 20 years before they finally divorced each other in 1992. They were first married in 1961. This piece of evidence has not really been challenged or disputed by the plaintiff. The battle lines relate to the question as to whether the 2nd defendant had signed/executed the Application Form for loan and the MOC as a result of undue influence on the part of the 1st defendant. On the Application Form, she has testified as follows:

> (DW1 shown document on pp. 1 to 10 of exhibit A and on p. 11 therein). Looking at p. 7 therein, my signature appears on the left, I was forced to sign this. I did not sign it voluntarily. On p. 11, my signature also appears. One morning my ex-husband brought me to the plaintiff company. Initially, I did not know he was bringing me to the finance company. I knew that only after he had brought me there. There, a male staff from the finance company took out a form which looked like the document on pp. 1 to 10 of exh. A. He placed it on the table in front of me and so I asked him what it was. When my ex-husband heard what I asked, he immediately took the form and told me not to ask so much. He told me just to sign the said form. At that moment, I refused to sign. When I refused, he became very angry and told me to sign

a it. He said I must sign and that there would be no harm done to me if I signed. He said he would bear all the responsibility. At that time, I was afraid he might beat me, so I signed it reluctantly.

At the time he did not tell me he was going to purchase a house at Pisang Road. I did not know he wanted to include my name initially. I came to know b of it because of this case. I did not know what I was signing when I signed the document on p. 7 of exh. A. When I signed on p. 11 of exh. A, I noticed the amount of $245,000 I did not know what it was all about. I signed on p. 11 of exh. A because my ex-husband had forced me to do so. I did not sign it voluntarily.

c And as regards the MOC on pp. 12 and 13 of exh. A, the 2nd defendant has testified that:

I was forced by my ex-husband to sign. I was afraid of being beaten up, so I just signed. I did not know what it was all about. I knew that whenever I refused to do as he asked, he would beat me up. He had done this in front of d my colleagues and even in front of my students. He told me it was a very simple matter and that I merely need to sign. He had beaten me up at the institute. It did not matter where we were. He would do this if he was not happy. I signed the Memorandum of Charge in the lawyer's office. In that office, I asked a lady there what it was all about. Before she could reply, my ex-husband took this document away from her and told her that I was his wife e and that he had already explained the document to me and that it was not necessary for her to explain the document further. I was forced by my ex-husband to sign the said form as per p. 13 of exh. A. The lady was one of the staff in the firm. She was not a lawyer. She told me she was just a staff there. When I was in that office, I did not see any lawyer there.

f It is quite evident from her testimony that the 2nd defendant has raised two major allegations, namely (1) that she signed the Application Form for loan and subsequently executed the MOC out of fear of being beaten up by her husband the 1st defendant and (2) that she did not know what those documents were all about at all material times. Now, given the undisputed and g incontrovertible evidence that the 2nd defendant had been a teacher of nine years experience as well as a cashier of a commercial institute at the material time, it is extremely difficult to believe that she would not have read the said documents herself or at least caused the contents therein to be read and/or explained to her, even assuming for the moment, that she might have been h pressured into signing the said documents by the 1st defendant. Her experiences as a teacher and cashier would have almost instinctively compelled her to inquire what the documents she had to sign were all about. That would be the most sensible, reasonable and logical thing to do notwithstanding the alleged situation she was in. I do not therefore accept her testimony that she

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knew nothing of the contents of the documents in question at the time she signed them. In my view, she knew perfectly well what she was signing. As regards her allegation that she was forced by the 1st defendant to sign the said documents, on very significant factor, I think, which tends to militate against that proposition is the fact that the transaction to which the Application Form and the MOC relate, was to the obvious advantage of the 2nd defendant. Both documents were concerned with the granting of a loan by the plaintiff of a sum of $245,000 for the purchase of a double storey detached house described as Lot 178, Kuching Town Land District, Section 17. Both the 1st and 2nd defendants were to be the co-proprietors of the said property. There is absolutely nothing in the evidence to demonstrate that the transaction relating to the two documents in question was to the manifest disadvantage of the 2nd defendant. On the contrary, she had everything to gain by being a co-proprietor of the property.

For the reasons given, the allegation of the 2nd defendant that her husband the 1st defendant had exercised domination over her at the time she signed the Application Form and executed the MOC could not have any merit whatsoever. To hold otherwise would be in violation of the laws of normal human behaviour and runs counter to the dictates of reason and common sense. I therefore reject the allegation completely.

I come now to the second line of defence launched by the 2nd defendant which, in the words of her counsel, is "that the plaintiff had constructive, if not actual, notice of the undue influence exercised by the 1st defendant over the 2nd defendant." Here, the 2nd defendant has testified, as regards the signing of the Application Form, that when a male staff of the plaintiff took it out for her to sign, she had asked what it was all about but that before she could get any reply, her husband the 1st defendant had immediately intervened by telling her not to ask too much; that she subsequently signed it because she was afraid of being beaten up by her husband. It was suggested that this male staff of the plaintiff, being present at the material time, would have been aware of the pressure or undue influence exerted by the 1st defendant over the 2nd defendant and therefore, under the circumstances, the plaintiff would have constructive notice of the pressure or undue influence.

In my view, the mere fact that the 1st defendant had intervened or behaved in the manner alleged by the 2nd defendant, would not, as a matter of course, have saddled the male staff of the plaintiff with notice that there was pressure or undue influence exerted by the 1st defendant over the 2nd defendant. Even if it be true that the 1st defendant had been abusing the 2nd defendant during their married life, there is absolutely nothing to indicate or suggest that the male staff in question or any other officer of the plaintiff had known of the

alleged abuses. Nor could the established evidence lead to any inference that the 1st defendant was acting as agent of the plaintiff. In the circumstances, there could be no constructive notice on the part of the plaintiff. The second line of defence therefore falters.

As I said at the outset, the plaintiff's claim is based on cl. 7 of the MOC which reads as follows:

> lf the amount realised by the Lender on a sale of the said land under the provisions of the Land Code after deduction and payment from the proceeds of such sale of all fees dues costs rents rates taxes and other outgoings on the Said Land is less than the amount due to the Lender and whether at such sale the Lender is the purchaser or otherwise the Chargor(s) shall pay to the Lender the difference between the amount due and the amount so realised and until payment will also pay interest on such balance at the Prescribed Rate as aforesaid with monthly rests.

It is to be noted that certain facts have been agreed in the Statement of Agreed Facts and these can be briefly stated herein. By an Application Form dated 19 November 1983, the 1st and 2nd defendants applied for a housing loan of $245,000 from the plaintiff to part-finance the purchase of the property described above. The 1st and 2nd defendants accepted the plaintiff's offer dated 28 December 1983. As security for the loan, the 1st and 2nd defendants executed in favour of the plaintiff, on a joint and several basis, a Memorandum of Charge over the said property and this was registered at the Kuching Land Registry Office on 16 March 1984 as Instrument No. L 3757/1984. The 1st and 2nd defendants defaulted in payment of the monthly instalments due under the MOC. The plaintiff then commenced foreclosure proceedings against the said property under Originating Summons No. KG. 234 of 1986. The said property was thereafter auctioned off on 16 April 1990 for $156,000.

Now, evidence had been led that at the date of the public auction of the property, the total amount owing to the plaintiff by the 1st and 2nd defendants was $461,823.13. Evidence was also adduced by the plaintiff to show that after taking into account the proceeds of sale of $156,000 and other expenses, etc, there was an unsatisfied balance sum outstanding under the MOC of $321,976.33. This was the amount the plaintiff had claimed against the 2nd defendant in this action. Miss Foo counsel for the 2nd defendant had, in her submission, questioned the correctness of the net proceeds of sale of $136,686.40. She contended that it was wrong for the plaintiff to have included the items, namely, (a) legal costs and disbursements amounting to $9,624.60 and (b) additional disbursements amounting to $181, and for the same to be deducted from the proceeds of sale of $156,000 because, according to her, these were in the nature of solicitor and client costs as reflected in the evidence

of Encik Mohd Sibli bin Abang Sapuan PW1, the assistant branch manager of the plaintiff and therefore did not fall within the bounds of the court order dated 8 November 1988. I think there is some justification for this. In any event, Mr. Libat counsel for the plaintiff had conceded to Miss Foo's submission on this issue. In the circumstances, the net proceeds of sale should properly read as $146,492.10. Miss Foo had also questioned the plaintiff's claim for interest at the rate of 13.5% pa from 17 April 1990 to date of full and final settlement, maintaining that there was no basis for such a claim having regard to the MOC which specifically provided for a 13% pa rate of interest and the court order dated 8 November 1988 providing the same. On this issue, I would agree with her.

In summary therefore, I hold, on the evidence adduced and for the reasons given, that the signing of the Application Form dated 19 November 1983 and the execution of the Memorandum of Charge dated 7 February 1984 were not obtained or procured by any pressure or undue influence on the part of the plaintiff as alleged by the 2nd defendant nor could any actual or constructive notice of such pressure or undue influence, if any, be attached to the plaintiff in this case. On that basis, I would also dismiss the 2nd defendant's counter-claim. I hold that the plaintiff has been able to establish its claims against the 2nd defendant as follows:

(a) the sum of $315,331.02;

(b) interest thereon at the rate of 13% pa from 17 April 1990 to date of full and final settlement; and

(c) costs to be taxed unless otherwise agreed.

Reported by Ling Hea Hoon